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The *Booth* Cases: Final Step to the Civil War

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THE *BOOTH* CASES: FINAL STEP TO THE CIVIL WAR

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I. INTRODUCTION

Nineteenth-century American history recounts that the slaveholding South's desire to secede from the Union was based on the North's growing hostility to slavery. The unionist North wanted to preserve the country but abolish slavery. Thus, economic, social, and political factors combined to create a Southern Confederacy, which fired the first shot at Fort Sumter and started the Civil War.

The traditional analysis of the American legal system's involvement in this crisis focuses on the *Dred Scott*[1] decision. This is the case most often scrutinized in any discussion of slavery in nineteenth-century America.[2] The *Dred Scott* decision in 1857 was, however, neither the first nor the last pronouncement of the Taney Court on slavery and related issues. In 1842, *Prigg v. Pennsylvania*[3] upheld the constitutionality of the Fugitive Slave Law of 1793 and invalidated Pennsylvania's personal liberty law of 1826. In 1859, the consolidated cases of *Ableman v. Booth* and *United States v. Booth*,[4] also authored by Taney, determined that the Fugitive Slave Law of 1850 was constitutional and that a state cannot invalidate a federal law.

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1. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); *see infra* text accompanying notes 161-69.

2. *See, e.g.*, DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS vii (1978):

> Scott v. Sandford . . . remains to this day the most famous of all American judicial decisions . . . . The principle reason for the prominence of the decision in American historical writing is the belief that it became a major causal link between the general forces of national disruption and the final crisis of the Union in 1860-61. Scholars have tended to be emphatic in affirming the connection but vague about its mechanics . . . . The Dred Scott decision by itself apparently caused no significant number of changes in political allegiance. Yet it was a conspicuous and perhaps an integral part of a configuration of events and conditions that did produce enough changes of allegiance to make a political revolution and enough intensity of feeling to make that revolution violent.

Id. at 561-62, 567.

3. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

4. Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).

Prigg stiffened the free states' resistance to enforcement of the 1793 Fugitive Slave Law.[5] *Dred Scott's* denial of citizenship and personhood[6] to African-Americans took the country another step toward violent resolution of the slavery controversy.

The *Booth* decision was the next logical step for the states: open resistance from a state supreme court, a state legislature, and a state's citizenry to the Fugitive Slave Law of 1850. It is important because the actions of people in the new, free state of Wisconsin in the decade prior to the Civil War amounted to the kind of secessionist behavior typically associated in American historical consciousness with the Southern slave states. Wisconsin was ready to secede from the Union over the removal of a fugitive slave from its borders. Such removal was a fairly ordinary occurrence throughout the United States in 1859.[7]

This Article begins by telling the fascinating, but complex, Glover/Booth story with all its legal twists and turns.[8] After detailing some previously unexplored aspects of the case, this Article describes the broader legal and historical context, considers the motives of the state and federal judiciary, and discusses the attitudes of the Wisconsin populace toward African-Americans. Finally, this Article draws conclusions about the place of the Booth story in nineteenth-century United States history. This Article lifts *Booth* out of obscurity, places it in the national context of 1850's America, and concludes by speculating as to the reasons for this unjustified obscurity over the last one-hundred thirty years. The objective is to articulate the importance of this case in pre-Civil

5. *See* FEHRENBACHER, *supra* note 2, at 43-47.

6. *See* FEHRENBACHER, *supra* note 2, at 363.

7. STANLEY W. CAMPBELL, THE SLAVE CATCHERS 6, app. at 207 (tbl. 12) (1970) (noting that United States Census reported number of slaves who had escaped into free states in 1850 was 1011; number of fugitive slave cases documented during period 1850-1860 totaled 332).

8. The facts of the story were pieced together from a number of sources. *See* titles cited *infra* notes 18, 117-120. The most coherent source by far is A.J. Beitzinger, *Federal Law Enforcement and the Booth Cases*, 41 MARQ. L. REV. 7 (1957). Professor Beitzinger was particularly diligent in mining the archival sources in Washington, D.C., and his article clarifies many of the details of this complicated saga. However, Professor Beitzinger views the Booth story "purely as a law enforcement problem." *Id.* at 7. *Booth* is a law enforcement problem only in the sense that the Civil War was a law enforcement problem. Such a narrow frame of reference does an injustice to a very complex legal historical episode with broad-based philosophical and moral underpinnings. The question was not simply how to enforce the fugitive slave laws. The bigger questions were why these laws were still considered valid at the mid-point of the nineteenth century and why the national American conscience had not evolved further by that time.

War slavery litigation. What begins as the tale of a captured fugitive slave quickly becomes the story of an outraged public consciousness making demands of an only partially responsive legal system. That system was substantially rooted in judicial conservatism (with its adherence to precedent and a view of the Supreme Court as operating above the political fray) as much as political conservatism.

II. THE STORY OF JOSHUA GLOVER

Joshua Glover[9] was an African-American who for several years lived and worked at a saw mill four miles outside Racine, Wisconsin. On the evening of Friday, March 10, 1854, he was playing a game of cards with a few friends when there came a knock at the door.[10] Glover told his friends not to open the door until the identity of those outside was determined.[11] One of his companions, a mulatto named Turner, later considered a confederate of the visitors, opened the door.[12] There stood Bennami Garland, from St. Louis, Missouri, who claimed Joshua Glover was his runaway slave;[13] deputy United States Marshals Charles Cotton of Milwaukee and John Kearney of Racine; and five other men. Although Cotton (acting in the absence of the U.S. Marshal, Stephen Ableman) supposedly had a warrant for Glover's arrest issued by Federal District Judge Andrew G. Miller,[14] none of the histori-

9. The said Joshua Glover is described in said affidavit to be forty-four or forty-five years of age, about five feet six or eight inches high, spare built, with rather long legs, very prominent knuckles, has large feet and hands, has a full head of wool, eyes small and inflamed, is of dissipated habits, is of rather an ashy black color. . . . [He] . . . had one of his shoulders stiff from dislocation, and had stooping shoulders and a slow gait.

In re Booth, 3 Wis. 144, 150, 155 (1854).

10. *High-Handed Outrage! Attempt to Kidnap a Citizen of Racine by Slave-Catchers*, RACINE ADVOCATE, Mar. 20, 1854, at 1 [hereinafter *High-Handed Outrage*].

11. *Id.*

12. *Id.* "His inhuman perfidy in this transaction has branded him with a mark that will last longer than the color of his skin." *Id.*

13. *In re Booth*, 3 Wis. at 155. Glover was alleged to have been the foreman of Garland's farm four miles outside St. Louis until his escape in the spring of 1852. Garland bought Glover on January 1, 1849. *Id.*

14. The warrant for Joshua Glover's arrest is reproduced at 3 Wis. at 149-50. For an even more detailed account of this entire episode, see PARKER M. REED, THE BENCH AND BAR OF WISCONSIN 496-504 (1882). Reed is the only commentator who spends much time discussing the fact that a warrant was issued. *Id.* at 497-98. However, the author could find no commentator who states that Glover was shown the warrant.

cal accounts states that the warrant was produced at Glover's home.

Glover was bludgeoned, manacled, and taken bleeding to the wagon waiting outside.[15] Initially, they rode toward Racine but the prospect of facing angry citizens caused them to make a detour.[16] Avoiding the main highway, Glover, Garland, and Cotton headed north to Milwaukee where they arrived early the next morning.[17] Joshua Glover was placed in the county jail pending a hearing before Judge Miller.[18]

That same morning the people of Racine gathered together at the ringing of the courthouse bell and adopted a resolution that stated in part:

> -Resolved, that we look upon the arrest of said Glover as an outrage upon the peaceful rights of this assembly, it having been made without the exhibition of any papers, by first clandestinely knocking him down with a club, and then binding him by brute force and carrying him off.
>
> -Resolved, that we, as citizens of Racine, demand for said Glover a fair and impartial jury trial, in this, the state where he has been arrested, and that we will attend in person to aid him, by all honorable means, to secure his unconditional release, adopting as our motto the Golden Rule.
>
> -Resolved, that inasmuch as the Senate of the United States has repealed all compromises heretofore adopted by the Congress of the United States, we as citizens of Wisconsin are justified in declaring, and do hereby declare, the slave-catching law of 1850 disgraceful and also repealed.[19]

A delegation of one hundred men was appointed to go to Milwaukee and represent the sentiments of the Racine citizens.[20] They arrived in Milwaukee about 5:00 p.m. and joined the throng of

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15. *High-Handed Outrage*, *supra* note 10, at 1.

16. REUBEN G. THWAITES, THE STORY OF WISCONSIN 249 (1890).

17. *Id.*

18. 3 Wis. at 156. With some minor variations, most commentaries agree on the facts as outlined here. *See, e.g.*, JAMES I. CLARK, WISCONSIN DEFIES THE FUGITIVE SLAVE LAW 106-07, 113 (1955); CARL SCHURZ, THE REMINISCENCES OF CARL SCHURZ II 105-15 (1907); THWAITES, *supra* note 16, ch. IX.

19. *High-Handed Outrage*, *supra* note 10, at 1; *see also* DANIEL HOWE, POLITICAL HISTORY OF SECESSION 236-38 (1914).

20. Vroman Mason, *The Fugitive Slave Law in Wisconsin with Reference to Nullification Sentiment*, *in* PROCEEDINGS OF THE STATE HISTORICAL SOCIETY OF WISCONSIN 117, 124 (1895).

5,000 people reported to have gathered on the courthouse square.[21] One of the Milwaukee citizens most influential in gathering together this huge crowd was Sherman M. Booth, the fiery abolitionist editor of the *Free Democrat*, a local newspaper.[22] Although he would later deny it,[23] Sherman Booth was said to have rushed through the streets on horseback shouting, "Freemen to the rescue! Slave-catchers are in our midst! Be at the courthouse at two o'clock."[24] On the other hand, at least one commentator reported that Booth actually "counseled the people against violence."[25]

At the request of Booth's attorneys, Milwaukee County Court Judge Jenkins issued a writ of habeas corpus for the release of Joshua Glover, but the sheriff refused to serve it,[26] acting under the influence, if not the direct orders, of Federal District Judge Miller.[27] Judge Miller also postponed the hearing on the writ until Monday, hoping that by then the crowd would have dispersed or the military would have arrived.[28] There is some evidence that the soldiers in a battalion stationed nearby had peremptorily "declined to do duty."[29]

The sheriff's refusal to act on the writ was transmitted to the crowd at the courthouse, who had been listening to the oratory of "the most eloquent and influential members of the Milwaukee bar."[30] By 6:00 p.m. the crowd would no longer be contained.[31] They were particularly incensed at the prospect of Glover being held in jail over the Sabbath.[32] With a battering ram ("the writ of

21. *High-Handed Outrage*, *supra* note 10, at 1. According to the UNITED STATES CENSUS OF 1850, the total population of Milwaukee was 20,061. The total population of Racine City was less than 6000. If the newspaper account is accurate, this was a phenomenally large crowd. Another account describes it as "the largest public meeting ever held in the place . . . ." REED, *supra* note 14, at 497.

22. Mason, *supra* note 20, at 124.

23. JOHN B. WINSLOW, STORY OF A GREAT COURT 73 (1912) (citing a speech made by Booth in Madison, Mar. 12, 1897) [hereinafter WINSLOW, GREAT COURT]. John Winslow reproduces most of Booth's speech in *Special Address: The Booth Case—A Chapter from the Judicial History of Wisconsin*, 29 PROC. OF THE ILL. ST. B. ASS'N 43, 49-50 (1905) [hereinafter Winslow, *Special Address*].

24. Beitzinger, *supra* note 8, at 10; CLARK, *supra* note 18, at 6.

25. Reed, *supra* note 14, at 499.

26. *High-Handed Outrage*, *supra* note 10, at 1.

27. *High-Handed Outrage*, *supra* note 10, at 1.

28. Beitzinger, *supra* note 8, at 10.

29. Beitzinger, *supra* note 8, at 11.

30. *High-Handed Outrage*, *supra* note 10, at 1.

31. *High-Handed Outrage*, *supra* note 10, at 1.

32. *High-Handed Outrage*, *supra* note 10, at 1.

'open sesame' ") they broke into the county jail, freed Glover, and cheered as he climbed onto a wagon and left for Racine.[33] Shortly thereafter, Glover left for Canada via the Underground Railroad.[34] Nothing more was ever reported about Joshua Glover.

Bennami Garland, the slaveowner, was arrested on the charge of assault and battery by the Sheriff of Racine County, but Judge Miller released him on a writ of habeas corpus.[35] The local newspapers characterized this action as a violation of states' rights.[36]

A number of other Milwaukee and Racine citizens also were arrested because they aided Joshua Glover's escape. In the end, only Sherman Booth and John Rycraft were brought to trial.[37]

III. THE TRIALS OF SHERMAN BOOTH

Sherman Booth was arrested on March 15, 1854, charged with violating the Fugitive Slave Act of 1850, and brought before the U.S. Commissioner, Winfield Smith.[38] Smith required bail to insure Booth's appearance before the district court in its July session.[39] Booth initially paid the bail, but two months later decided he would rather go to jail, probably hoping to bring a test case in state court on the constitutionality of the federal law.[40] He was then placed in the county jail on May 26, 1854, on the charge of unlawfully aiding, abetting, and assisting Joshua Glover in his escape.[41]

The next day Sherman Booth applied to Abram D. Smith, one of the three justices of the Wisconsin Supreme Court, for a writ of habeas corpus.[42] The federal marshal, Ableman, was not certain

33. *High-Handed Outrage*, *supra* note 10, at 1. "As he went through the streets he aroused the enthusiasm of the crowds to a still higher pitch by holding up his manacled hands and shouting, 'Glory, Hallelujah!' " HOWE, *supra* note 19, at 230.

34. Howe, *supra* note 19, at 230.

35. *High-Handed Outrage*, *supra* note 10, at 1.

36. *Review of Judge Miller's Decision in the Garland Case*, RACINE ADVOCATE, Mar. 27, 1854. "Garland later recovered a judgment against Booth in the federal court for the value of the escaped slave. The collection of this judgment ruined Booth financially." Horace H. Hagan, *Ableman v. Booth*, 17 A.B.A. J. 19, 20 n.12 (1931).

37. *See infra* note 287.

38. Mason, *supra* note 20, at 128. The office of United States Commissioner was created in the 1850 Fugitive Slave Act. *See infra* text accompanying notes 151-59.

39. Mason, *supra* note 20, at 129.

40. Beitzinger, *supra* note 8, at 11; WINSLOW, GREAT COURT, *supra* note 23, at 74.

41. Mason, *supra* note 20, at 129.

42. *In re* Booth, 3 Wis. 13, 14 (1854).

whether he should comply with the state writ.[43] On the advice of U.S. District Attorney Sharpstein, he did comply, probably hoping to avoid a riot.[44] At the hearing, Justice Smith expressed a desire to consider the constitutionality of the Fugitive Slave Act.[45] While this took the U.S. District Attorney by surprise,[46] Booth's attorney, Bryon Paine,[47] gave a long and eloquent indictment of the 1850 Fugitive Slave Act, concluding that it was unconstitutional.[48] Sharpstein's hastily prepared counterarguments were simply no match for Paine.[49]

Justice Smith ordered Booth released from jail and declared the Fugitive Slave Law of 1850 unconstitutional.[50] Sharpstein then petitioned the Wisconsin Supreme Court to review Smith's decision on certiorari.[51] In a 2-to-1 decision, Justices Whiton and Smith found the warrant for Booth's arrest was defective because it did not precisely state that Booth had aided a fugitive from labor to escape from custody.[52] They also agreed that the 1850 law was unconstitutional.[53] Justice Crawford defended the law's constitutionality.[54]

Booth's freedom was shortlived. The federal district court of Wisconsin had started its summer session and the grand jury indicted both Sherman Booth and John Rycraft[55] for aiding and abetting Glover's escape.[56] After their arrest, both men applied to the Wisconsin Supreme Court for a writ of habeas corpus, which the court denied.[57] The court reasoned that because jurisdiction was then firmly established with the federal court, no justification ex-

43. Beitzinger, *supra* note 8, at 12.

44. Beitzinger, *supra* note 8, at 12.

45. Beitzinger, *supra* note 8, at 12.

46. Beitzinger, *supra* note 8, at 12.

47. Of Byron Paine it was said that he "drank in abolitionism with his mother's milk." WINSLOW, GREAT COURT, *supra* note 23, at 74.

48. 1 JOHN BERRYMAN, HISTORY OF THE BENCH AND BAR OF WISCONSIN 138-43 (1898) (Payne's statements printed in part); *see also* WINSLOW, GREAT COURT, *supra* note 23, at 76-77.

49. Beitzinger, *supra* note 8, at 12.

50. *In re* Booth, 3 Wis. 13, 46 (1854).

51. Beitzinger, *supra* note 8, at 12.

52. *In re* Booth, 3 Wis. 13, 54, 60 (1854).

53. *Id.* at 67-68.

54. *Id.* at 76.

55. The commentaries are inconsistent in the spelling of Rycraft (or Ryecraft). Here the Wisconsin Supreme Court's spelling (Rycraft) is adopted for uniformity's sake.

56. Beitzinger, *supra* note 8, at 13.

57. *Ex parte* Booth, 3 Wis. 134 (1854).

isted for interfering with it.[58]

In September 1854, United States Attorney General Caleb Cushing appealed the Wisconsin court's decision declaring the 1850 Fugitive Slave Law unconstitutional to the Supreme Court of the United States.[59] The two issues presented were: 1) the constitutionality of this controversial law, and 2) the appropriate jurisdictional limits to be placed on a state with regard to issuance of writs of habeas corpus for federal prisoners.[60] Chief Justice Taney issued a writ of error requiring a return by the first Monday of December 1854.[61]

Judge Miller heard Rycraft's case in November 1854 and Booth's in January 1855.[62] Both men were found guilty of aiding, assisting, and abetting Glover's escape.[63] Rycraft was sentenced to ten days in the Milwaukee County jail and fined $200.[64] Booth was sentenced to thirty days in the county jail and fined $1000.[65]

Booth and Rycraft, undoubtedly spurred on by popular support,[66] petitioned the Wisconsin Supreme Court for two writs of habeas corpus—one for the federal marshal, Ableman, and the other for the county sheriff.[67] On January 30, 1855, the county sheriff and 2000 well-wishers marched the prisoners to the Milwaukee railroad station, where they departed for the state supreme court hearing in Madison.[68] After the hearing, Booth and Rycraft were released.[69] The court reasoned that the indictment failed to describe adequately Glover's status and therefore did not set forth an offense punishable by federal law.[70] By this action, the Wisconsin Supreme Court contradicted its earlier decision relating to non-

58. *Id.* at 137.

59. Beitzinger, *supra* note 8, at 14.

60. Beitzinger, *supra* note 8, at 14.

61. Beitzinger, *supra* note 8, at 14.

62. Beitzinger, *supra* note 8, at 14-15.

63. Beitzinger, *supra* note 8, at 14-15.

64. Beitzinger, *supra* note 8, at 64.

65. Beitzinger, *supra* note 8, at 64.

66. Beitzinger, *supra* note 8, at 16; WINSLOW, GREAT COURT, *supra* note 23, at 78 ("This conviction aroused intense feeling all over the State.").

67. Beitzinger, *supra* note 8, at 16.

68. Beitzinger, *supra* note 8, at 16.

69. Beitzinger, *supra* note 8, at 16.

70. *In re* Booth & Rycraft, 3 Wis. 144, 167-68 (1854); *see* discussion *infra* note 270 and accompanying text.

interference with federal court proceedings.[71]

Considering the strong sentiment of the Wisconsin populace and its state judiciary, federal Judge Miller confined himself to delivering a statement condemning the actions of the Wisconsin Supreme Court.[72] He predicted that if such rebellious actions were allowed to stand as precedent, any state judge could ignore federal court decisions and decide that any act of Congress was unconstitutional, thus opening the jail doors for the federal prisoners in the states.[73]

The U.S. District Attorney Sharpstein secured a copy of the state supreme court record from the clerk of the court.[74] He did so in anticipation of the court refusing to comply with any future request from Chief Justice Taney that the record be sent up to the Supreme Court,[75] a well founded fear. The state court forbade the clerk to make a return or to enter the writ of error in the state court's records.[76] This action flew in the face of the Wisconsin court's own assertion two years earlier, when it considered the first habeas corpus writ, that the Supreme Court of the United States "has the power finally to decide all questions growing out of an alleged violation of the constitution of the United States by an act of Congress."[77]

In March 1856, Attorney General Cushing requested and received a postponement on the hearing of the second *Booth* case.[78] However, Chief Justice Taney insisted that the Wisconsin Supreme Court once again be requested to comply with the order to respond to the United States Supreme Court's writ of error.[79] He also decided that both *Booth* cases would be consolidated and heard in the next term.[80] By March 1857, it was clear that the Wisconsin court again would refuse to accept the high court's writ of error, and so

71. Beitzinger, *supra* note 8, at 16, 18 n.51; *see also* 3 Wis. 144, 170-71. The earlier decision was *Ex parte* Booth, 3 Wis. 134 (1854).

72. Beitzinger, *supra* note 8, at 17 n.46.

73. Beitzinger, *supra* note 8, at 17 n.46.

74. Beitzinger, *supra* note 8, at 18.

75. United States v. Booth, 59 U.S. (18 How.) 476 (1856); Beitzinger, *supra* note 8, at 18.

76. United States v. Booth, 59 U.S. (18 How.) 476, 477-78 (1856); *see* Mason, *supra* note 20, at 138.

77. *In re* Booth, 3 Wis. 1, 66 (1854).

78. Beitzinger, *supra* note 8, at 19.

79. Beitzinger, *supra* note 8, at 19.

80. Beitzinger, *supra* note 8, at 19.

the unofficial copy of the record obtained earlier by Sharpstein was used.[81]

The United States Supreme Court finally considered the *Booth* cases jointly in January 1859.[82] Chief Justice Taney's decision upheld the Fugitive Slave Law of 1850[83] and severely castigated the Wisconsin Supreme Court throughout his opinion.[84] The Court reversed and remanded the case to the Wisconsin Supreme Court throughout his opinion. This so infuriated the people of Wisconsin that the state legislature passed resolutions denouncing the Supreme Court's action as "an arbitrary act of power . . . without authority, void and of no force" and urging "positive defiance" by the states as the "rightful remedy."[85]

In the summer of 1859, the Wisconsin Supreme Court reconsidered *Booth*. Two events probably influenced the tone of that decision. First, the composition of the Wisconsin Supreme Court changed.[86] Byron Paine (formerly Booth's attorney) was elected to replace Abram Smith.[87] The very conservative Luther Dixon succeeded to the Chief Justiceship when Whiton died.[88] Orasmus Cole, the third justice, had participated in the second *Booth* decision, but not the first.[89]

Secondly, Sherman Booth was tried for the seduction of Caroline Cook, a fourteen-year-old girl.[90] Although Booth supposedly made two pre-trial confessions, the jury could not agree on a verdict and Booth was freed.[91] His public image, however, would never be quite as pure as before this highly publicized trial.[92]

On March 1, 1860, Judge Miller issued an order for Booth's rearrest after a prolonged deferral of action because of fear of repri-

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81. United States v. Booth, 59 U.S. (18 How.) 476 (1856); Ableman v. Booth, 59 U.S. (18 How.) 479 (1856).

82. Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).

83. *Id.* at 526.

84. *Id.*

85. 1859 Wis. Laws 247-248. The resolution is virtually identical to the Kentucky nullification resolution of 1799. 1799 Ky. Acts 207-10.

86. Beitzinger, *supra* note 8, at 22.

87. DICTIONARY OF WISCONSIN BIOGRAPHY 277, 330 (1960).

88. *Id.* at 102-03.

89. *Id.* at 82 (Orasmus Cole was not elected as associate justice until 1855).

90. THE TRIAL OF SHERMAN M. BOOTH FOR SEDUCTION (1859).

91. *Id.* at 294; Beitzinger, *supra* note 8, at 22-23.

92. Beitzinger, *supra* note 8, at 22-23; *see also* RICHARD CURRENT, THE HISTORY OF WISCONSIN II 271-74 (1976); A.J. Beitzinger, *Edward George Ryan—19th Century Lawyer*, 1956 WIS. L. REV. 248, 263-68 (1956) (describing seduction trial).

sals from a Wisconsin antislavery populace.[93] Booth was placed in the federal customs house at Milwaukee.[94] The Wisconsin Republican party, which dominated the press, took up Booth's cause once more.[95]

On March 6, 1860, Booth again applied to the Wisconsin Supreme Court for a writ of habeas corpus.[96] Rumors circulated of a possible clash between the state militia trying to enforce such a writ and federal troops trying to block its enforcement.[97] However, the state supreme court refused to grant the writ.[98]

Booth's term of imprisonment expired on March 23, 1860.[99] He remained in the customs house, however, because he refused to pay the fine.[100] He also filed a suit for false imprisonment against Judge Miller and the new U.S. Marshal, John Lewis.[101] During the rest of the spring and into the summer Booth wrote a number of inflammatory letters regarding his imprisonment, which were published in newspapers statewide.[102] A second application for a writ of habeas corpus was made to the Wisconsin Supreme Court and again it was denied.[103]

On August 1, 1860, a group of armed men succeeded in breaking Booth out of the customs house.[104] He was taken to Waupun, Wisconsin where Hans C. Heg, the state prison commissioner, took him into protective custody.[105] Two days later, a federal deputy marshal went to the state prison to rearrest Booth, but the Commissioner refused to give him up.[106] On August 5, Booth traveled to Ripon, Wisconsin to make a speech and was escorted to the hall by two-hundred armed men.[107] Federal Deputy Marshal Frank

93. Beitzinger, *supra* note 8, at 26.
94. Beitzinger, *supra* note 8, at 26.
95. Beitzinger, *supra* note 8, at 26; *see also* HOWE, *supra* note 19, at 236 ("Indignation meetings were held in many places in Wisconsin.").
96. Ableman v. Booth, 11 Wis. 517, 555 (1860).
97. Beitzinger, *supra* note 8, at 27; HOWE, *supra* note 19, at 236; George W. Carter, *The Booth War in Ripon, in* PROCEEDINGS OF THE STATE HISTORICAL SOCIETY OF WISCONSIN 161, 164-65 (1902).
98. *Ableman*, 11 Wis. at 517, 558.
99. Beitzinger, *supra* note 8, at 27.
100. Beitzinger, *supra* note 8, at 27.
101. Beitzinger, *supra* note 8, at 27.
102. Beitzinger, *supra* note 8, at 27; Carter, *supra* note 97, at 165.
103. Beitzinger, *supra* note 8, at 28.
104. Beitzinger, *supra* note 8, at 28.
105. Beitzinger, *supra* note 8, at 28.
106. Beitzinger, *supra* note 8, at 29.
107. Beitzinger, *supra* note 8, at 29.

McCarty and two assistants tried to arrest him onstage, but the crowd surged forward and forcibly ejected the three officers.[108]

On August 29, the very persistent Deputy Marshal McCarty and five assistants stealthily approached the house near Ripon where Booth was staying, hoping to take him by surprise.[109] They were met, however, by sixty to seventy armed men and forced to retreat.[110] "McCarty said he was getting disgusted with the whole business anyway, and would return the warrant to the court unexecuted."[111] A second federal officer also tried to take Booth but was seized by a mob, who paraded him through the streets of Ripon with a yoke on his head.[112]

Finally, on October 8, 1860, Marshall Lewis captured Booth, returning him to the Milwaukee customs house where he remained for over three months.[113] After Lincoln's election, Booth applied to the outgoing President Buchanan for a pardon.[114] On the day before Lincoln's inauguration, March 4, 1861, Buchanan granted the pardon, thus ending the saga.[115]

IV. THE UNEXPLORED QUESTIONS

While the drama of this story stands out even in a dramatic historical time, it still raises numerous questions. The first line of inquiry is suggested in the opening sentences of a speech printed in the *Michigan Law Review* in 1913:

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108. Beitzinger, *supra* note 8, at 29; Carter, *supra* note 97, at 166-67 ("It must be conceded that the proceeding was somewhat disrespectful to the marshal and liable to be construed as against the peace and dignity of the United States of America.").

109. Beitzinger, *supra* note 8, at 30.

110. Beitzinger, *supra* note 8, at 30.

111. Carter, *supra* note 97, at 170.

112. Beitzinger, *supra* note 8, at 30. This second federal officer is not mentioned in Carter's highly detailed account of this period, *The Booth War in Ripon*, *supra* note 97.

113. Beitzinger, *supra* note 8, at 31.

114. HOWE, *supra* note 19, at 238.

115. Beitzinger, *supra* note 8, at 32. "Probably both Stanton [the U.S. Attorney General] and the President thought that the rebellion in the South was all that the Administration could manage without encouraging another in Wisconsin. So on the last day of Buchanan's Administration, Booth was pardoned." HOWE, *supra* note 19, at 238. Thomson, however, credits Judge Miller with procuring the pardon:

> He wrote to Buchanan without solicitation from any quarter that it would be a graceful ending of "this unfortunate affair" if the President would issue to Booth immediately an unconditional pardon, on his retirement from the office of chief magistrate. Buchanan immediately replied, thanking Judge Miller for the suggestion, and assuring him that he would act upon it.

A.M. THOMSON, A POLITICAL HISTORY OF WISCONSIN 101 (1898).

> Probably most well informed persons of the present generation associate the notion, once maintained, that a state might secede or nullify an act of Congress, with the South and its earlier statesmen . . . . Yet it seems to be well authenticated that . . . the first formal and definite effort at nullification under solemn judicial sanction was made by the state of Wisconsin . . . .[116]

Why have the *Booth* cases remained so obscure if they truly are such a significant historical event? Why are they not well known as the first instance of secession? Why have they not enjoyed the popularity in the American public's consciousness of the history of slavery that the *Dred Scott* case has?[117]

The second line of inquiry relates to why Sherman Booth was singled out for persecution/prosecution when the actions of freeing Glover and resisting the enforcement of the Fugitive Slave Act of 1850 were so obviously a concerted effort on the part of a great many people in Wisconsin, including legislators and judges. Was Booth's behavior so inflammatory as to make him a natural target for exemplary prosecution?

The third line of inquiry concerns the motivations of all the judges involved. State and national politics unquestionably entered into the deliberations, for the state supreme court justices were

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116. S.S. Gregory, *A Historic Judicial Controversy and Some Reflections Suggested by It*, 11 MICH. L. REV. 179 (1913); *see also* HOWE, *supra* note 19, at 238 ("Here then we have the Legislature, the Governor, the Supreme Court, and the people of Wisconsin committed to nullification as rank as anything of the kind ever advocated by Calhoun or the authorities of South Carolina.").

117. "*Dred Scott* had greater political implications, but *Ableman v. Booth* was the nail in the coffin of a legal strategy that had preoccupied the antislavery bar for almost the entire period of militant abolitionist activity." ROBERT COVER, JUSTICE ACCUSED 187 (1975).

"The [*Booth*] opinion was pronounced by Chief Justice Taney, but not until after his opinion in the *Dred Scott* case, which had greatly weakened the respect felt in the North for any opinion given by him involving the interests of slavery." HOWE, *supra* note 19, at 233.

What is curious is how often the *Booth* cases are overlooked. In a very insightful essay on Taney, *Roger Taney and the Limits of Judicial Power in* THE AMERICAN JUDICIAL TRADITION (1976), G. Edward White discusses the major cases of the Taney period, citing Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), Strader v. Graham, 51 U.S. (10 How.) 82 (1850), Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), and Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841), but there is no mention of *Ableman v. Booth*. But see ROBERT COVER, JUSTICE ACCUSED, at 166 n. (1975), where the author describes *Prigg*, *Booth*, and *Dred Scott* as "the three most important Supreme Court decisions on slavery."

Finally, though the *Booth* cases have received insufficient recognition nationally, they have been regarded as the leading historical Wisconsin cases among the members of the legal community in the state. Evan A. Evans, *Fifteen Important Decisions of the Wisconsin Supreme Court*, 23 MARQ. L. REV. 71 (1939).

elected officials. Neither Judge Miller nor Chief Justice Taney were elected,[118] however, so other explanations must be sought for their judicial behavior. The biographical information on each judge and justice given below may provide some insight into their motivations.

The *Booth* cases have been cited in numerous court decisions and legal or historical books and articles to support propositions about federalism,[119] the proper and improper use of writs of habeas corpus,[120] fugitive slave legislation and the problems of enforcing it,[121] and Wisconsin's development as a state that has always gone its own way.[122] None of them, however, combine an examination of the facts with an analysis of the opinions set in their historical context.

The *Booth* cases constituted the final rung on the ladder leading to the Civil War.[123] They also demonstrate that "hard cases make bad law."[124] The resolution of legal disputes at such great variance with public opinion can serve as a focal point for the onset of cataclysmic political upheaval.

V. BACKGROUND TO THE *BOOTH* CASES

An understanding of the *Booth* cases and their historical importance requires a sense of both the legal framework and the major preceding historical events. These include the fugitive slave clause of the Constitution,[125] the 1793 Fugitive Slave Law,[126] *Prigg*

118. U.S. CONST. art. III, § 1: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ."

119. *See, e.g.*, Richard S. Arnold, *State Power to Enjoin Federal Court Proceedings*, 51 VA. L. REV. 59, 65 n.35 (1965); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1111 *passim* (1977); *Interposition vs. Judicial Power: A Study of Ultimate Authority in Constitutional Questions*, 1 RACE REL. L. REP. 465, 492 (1956).

120. *See* ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS 649 (1858).

121. *See* HOWE, *supra* note 19, at 229; THOMAS D. MORRIS, FREE MEN ALL 173-80 (1974).

122. *See* CLARK, *supra* note 18; Mason, *supra* note 20; John Sundquist, *Construction of the Wisconsin Constitution—Recurrence to Fundamental Principles*, 62 MARQ. L. REV. 531, 532 (1979).

123. 2 JOHN BERRYMAN, HISTORY OF THE BENCH AND BAR OF WISCONSIN 2 (1898) (They "contributed not a little to preparing the way for the conflict of arms between the free and slave states in 1861.").

124. Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) ("Great cases like hard cases make bad law.").

125. U.S. CONST. art. IV, § 2 (modified by Thirteenth Amendment).

126. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

v. Pennsylvania,[127] the 1850 Fugitive Slave Law,[128] and *Dred Scott*.[129] Some knowledge of Wisconsin's history is also important to understand why the people, the legislature, and the judiciary took the stands they did. With a brief explanation of these factors, a closer look at the opinions of the judges reveals both more and less judicial wisdom than one might have expected.

The first important facet is the fugitive slave clause of the Constitution, Article IV, section 2. It states:

> No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered upon claim of the party to whom such service or labor may be due.

The difficulty with this clause is that it left certain concepts undefined. How was the "delivery" to take place? What constituted a proper "claim?" With a sizeable slave population,[130] clarifying and enabling legislation was definitely needed.

The first clarifying law was "An act respecting fugitives from justice, and persons escaping from the service of their masters" passed on February 12, 1793.[131] It required that a number of specific procedures be followed. An indictment or affidavit issued by a magistrate and certified by the governor of the state or territory from which the fugitive had fled had to be produced to the executive authority of the state in which the fugitive had been found.[132] The latter state authority was required to assist in the fugitive's arrest and to deliver the fugitive to the agent of the originating state's executive.[133] The Act specified a fine and term of imprisonment for anyone assisting in the fugitive's escape.[134] The Act further described judicial proceedings and necessary proof.[135]

The first major case interpreting the 1793 Act was *Prigg v.*

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127. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

128. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462, *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200.

129. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

130. In 1790, the U.S. census showed the "free colored population" to be 59,466 and the slave population to be 697,897. By 1860, the U.S. census showed the figures to be 487,970 free colored and 3,953,760 slaves.

131. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

132. *Id.* § 1.

133. *Id.*

134. *Id.* § 2.

135. *Id.* § 3.

Pennsylvania,[136] in which the Supreme Court upheld its constitutionality. Edward Prigg, acting as agent for Maryland slaveowner Margaret Ashmore, went to Pennsylvania and applied for a warrant to remove Margaret Morgan, Ashmore's alleged fugitive slave.[137] Prigg secured the warrant and brought Morgan before the justice of the peace in Pennsylvania as required under the 1793 Act.[138] The justice of the peace refused to deal with the case.[139] Prigg then took Morgan and her two children back to Maryland and subsequently was indicted in Pennyslvania for kidnapping.[140] His conviction was upheld by the Pennsylvania Supreme Court but reversed by the U.S. Supreme Court in 1842.[141] The decision had a much greater impact than the simple freeing of a convicted kidnapper. In addition to upholding the 1793 Fugitive Slave Act, it also declared unconstitutional the 1826 Pennsylvania personal liberty law,[142] casting into doubt the personal liberty laws of many other northern states. The majority opinion, written by Justice Story, stated that enforcement of the federal law was largely the responsibility of federal authorities.[143] Given the scarcity of federal officials in some of the other states, enforcement of such an unpopular federal law without the assistance of state officials became far more difficult.[144] While state officials were not absolutely prohibited from enforcing the federal law, and indeed could arrest runaway slaves as part of their general police power, Story maintained that the states could not be coerced into doing so.[145] This point would be revisited in the *Booth* controversy. Chief Justice Taney, often considered a proponent of state independence of thought and action, nonetheless disagreed with this part of Story's opinion, recognizing the federal government's need to enlist the aid of state

136. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Judgment against Edward Prigg rendered in the York County Court of Oyer and Terminer was taken to the Pennsylvania Supreme Court on a writ of error in May term 1840. There it was affirmed *pro forma* and the case was carried to the Supreme Court of the United States. *Id.* at 558.

142. Law of Mar. 25, 1826, ch. 5777, 9 Pa. Laws. 95.

143. *Prigg*, 41 U.S. at 615-16.

144. FEHRENBACHER, *supra* note 2, at 45 ("Various northern legislatures enacted laws forbidding state officials to participate in the recovery of fugitive slaves.").

145. *Prigg*, 41 U.S. at 615-16, 625.

officials.[146] Many state officials ultimately chose not to assist in the enforcement of a law they found odious.[147]

Finally, *Prigg* is noteworthy because, "among other things, this was the first Supreme Court opinion in which slavery was explicitly recognized as a constitutionally protected institution with special privileges within the Union."[148] It certainly struck a nerve in the free states, notably Wisconsin, where several of the *Booth* opinions, especially those of Justice Smith, include critical analyses of *Prigg*.[149]

After *Prigg* exposed some of the inadequacies of the 1793 Fugitive Slave Act, particularly regarding enforcement, dissatisfaction began to grow, especially among the Southern states.[150] On September 18, 1850, Congress, responding to this pressure, passed "An Act to amend, and supplementary to, the Act entitled 'An Act respecting Fugitives from Justice, and Persons escaping from the Service of their Masters, approved February twelfth, one thousand seven hundred ninety-three.' "[151]

The 1850 Act was an attempt to resolve the uncertainties in the 1793 Act discovered in the intervening fifty-seven years.[152] It created commissioners as judicial officers to execute the judicial powers and duties of the law.[153] Their jurisdiction was made concurrent with the judges of circuit and district courts of the United States.[154] A stiff one thousand dollar penalty was prescribed for

146. "I think, the states are not prohibited; and that, on the contrary, it is enjoined upon them as a duty, to protect and support the owner, when he is endeavouring to obtain possession of his property found within their respective territories." 41 U.S. at 627. For a discussion of the Taney Court's attitude toward state-federal relations, see FEHRENBACHER, *supra* note 2, at 228-35.

147. Paul Finkelman, *Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, 25 CIVIL WAR HIST. 5, 9-10 (1979).

148. *Id.* at 10.

149. *In re Booth*, 3 Wis. at 49-52, 66-67, 107 (1854); *In re* Booth, 3 Wis. 144, 191 (1854); see also TITUS HUTCHINSON, JURISDICTION OF COURTS, THAT OF STATE COURTS ORIGINAL, THAT OF UNITED STATES COURTS DERIVATIVE (1855), for an interesting contemporary discussion of the *Booth* cases and *Prigg*.

150. *See* Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 YALE L.J. 161 (1921).

151. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462, *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200. For a discussion of both the 1793 and 1850 Fugitive Slave Acts, see Johnson, *supra* note 150.

152. *See* Johnson, *supra* note 150, at 169-70.

153. Act of Sept. 18, 1850, ch. 60, § 1, 9 Stat. 462, *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200.

154. *Id.* § 4.

any United States marshal who did not execute a warrant issued under this Act.[155] Commissioners were authorized to appoint a *posse comitatus* to execute warrants, "and all good citizens [were] hereby commanded to aid and assist in the prompt and efficient execution of this law."[156]

The hearing procedures specifically indicated that the alleged fugitive would not be allowed to testify.[157] Persons who helped the alleged fugitive escape faced stiffer penalties under the 1850 Act[158] than under the 1793 Act.[159] The Commissioner was entitled to a fee of ten dollars for granting the certificate, but only five dollars if the claimant's proof was insufficient to warrant granting a certificate.[160] As one commentator succinctly put it: "[F]eatures unnecessarily irritating enhanced the unpopularity of an intrinsically distasteful law."[161] Sherman Booth was prosecuted under this law four years after its passage.[162]

The intervening decision in *Dred Scott* has only indirect relevance to the *Booth* cases. *Dred Scott* encompassed eleven years of litigation, culminated in the 1857 Supreme Court opinion, and preceded by two years the Supreme Court's *Booth* decision.[163] However, none of the Wisconsin or federal *Booth* opinions cites *Dred Scott*. Nevertheless, it was an influential opinion and is so reflective of the biases of the time[164] that it must be considered as part of the context of the *Booth* cases.

Dred Scott, his wife, and two daughters were slaves owned by an Army doctor, John Emerson.[165] Although Missouri residents, they accompanied the doctor into the free state of Illinois and later into the free Wisconsin Territory.[166] Dred Scott waited, however, until his return to the slave state of Missouri to sue for his freedom,

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155. *Id.* § 5.

156. *Id.*

157. *Id.*

158. *Id.*

159. Act of Feb. 12, 1793, ch. 7, § 4, 1 Stat. 302, 305 (provided for a fine not exceeding $1000, imprisonment not exceeding six months, and civil damages of $1000).

160. Act of Sept. 18, 1850, ch. 60, § 8, 9 Stat. 462, 464, *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200 (provided for a fine of $500).

161. 1 BERRYMAN, *supra* note 48, at 28.

162. *In re* Booth, 3 Wis. 13 (1854).

163. *See infra* note 169 for commentary on *Dred Scott*.

164. Carter, *supra* note 97 at 161; WESTEL W. WILLOUGHBY, THE SUPREME COURT OF THE UNITED STATES 95 (1890).

165. Scott v. Sandford, 60 U.S. 393, 397-98 (1857).

166. *Id.* at 397.

after trying unsuccessfully to purchase it.[167] Eventually the case went to the Supreme Court, which held that Scott was not entitled to his freedom.[168] The commentary on the case is voluminous,[169] underscoring the fact that it is unquestionably the most important opinion authored by Roger Brooke Taney, and probably the one most damaging to his judicial reputation. Its importance for *Booth* lies in its proslavery cast. While *Dred Scott* specifically stated that African-Americans were not citizens, its implication was that they were not even persons.[170] This harsh attitude would later motivate the Wisconsin citizenry in 1859 to stand up for fair treatment for one of their own residents, Joshua Glover, regardless of his color.

Finally, one cannot ignore the social and political environment of Wisconsin. Proslavery sentiment existed in western and particularly in southwestern Wisconsin during its territorial days.[171] Generally, however, the territory was antislavery in orientation, with Racine County being the center of such sentiment.[172] The first abolition society was formed there in 1840, eight years before statehood.[173] In 1842, a territorial antislavery party was formed; in 1843, the first abolitionist newspaper in the territory, the *Wisconsin Aegis*, was established in Racine.[174] Its successor, the *American Freeman*, established in 1843, became famous because of its editor, Sherman M. Booth.[175]

Antislavery public opinion crystallized in 1850 with the passage of the Fugitive Slave Law.[176] Another shock to the public consciousness came early in 1854 with the repeal of the Missouri Compromise in the passage of the Kansas-Nebraska Act.[177] The

167. FEHRENBACHER, *supra* note 2, at 250.

168. 60 U.S. 393, 453.

169. Especially noteworthy are: FEHRENBACHER, *supra* note 2; DON E. FEHRENBACHER, SLAVERY, LAW AND POLITICS (1981) (abridged version of DRED SCOTT) [hereinafter SLAVERY, LAW AND POLITICS]; and WALTER EHRLICH, THEY HAVE NO RIGHTS (1979). Fehrenbacher's abridged work and Ehrlich's book both contain extensive bibliographies.

170. FEHRENBACHER, *supra* note 2, at 363.

171. Kate E. Levi, *The Wisconsin Press and Slavery*, 9 WIS. MAG. OF HIST. 423 (1926).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 425; *see also* Winslow, *Special Address*, *supra* note 23, at 46; *An Abolitionist in Territorial Wisconsin*, 52 WIS. MAG. OF HIST. 3 (1968-69).

176. Mason, *supra* note 20, at 120.

177. Act of May 30, 1854, Ch. 59, 10 Stat. 277. For a brief discussion of the impact of the Kansas-Nebraska Act in Wisconsin, see CLARK, *supra* note 18, at 15. For an inter-

Glover/Booth incidents revealed Wisconsin's answer to these measures.

While antislavery sentiment was strong, familiarity with the black man was more theoretical than real in early Wisconsin. In 1850 there were 635 free blacks and no slaves out of a total state population of 305,391.[178] By 1860, the black population had nearly doubled (1,171).[179] Racism did exist in Wisconsin.

> When the first state constitutional convention assembled in Madison in 1846, a young Irishman, destined to achieve eminence as Chief Justice of the state supreme court, addressed the delegates on the subject of Negro suffrage. In detail, Edward G. Ryan pictured the abject social condition and habits of the colored people of New York City. There, he proclaimed, "Every negro was a thief and every negro woman far worse." Defiantly he challenged any gentleman present to refute his words.[180]

The attainment of suffrage for black Wisconsin citizens illustrates the strength of racism in this antislavery state.[181] The first state constitutional convention, held in Madison in 1846, debated suffrage for African-Americans.[182] After a great deal of political wrangling, the delegates finally attached to the constitution a resolution on suffrage for men of color. A separate ballot was required on which a majority of all those voting in the general election had to vote affirmatively in order for this resolution to pass.[183] The constitution was defeated 20,233 to 14,119.[184] The suffrage question was defeated by a vote of 14,615 to 7,664.[185]

The second constitutional convention met in Madison in 1847-48.[186] Edward Whiton, another future Chief Justice of the state supreme court, debating in favor of the postponement of the suffrage question, said: "If that race become[s] enlightened sufficient

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esting, though hardly impartial, discussion of this legislation, "wicked as a covenant with hell," see FRANK A. FLOWER, HISTORY OF THE REPUBLICAN PARTY 81-96 (1884).

178. ZACHARY COOPER, BLACK SETTLERS IN RURAL WISCONSIN 4 (1977).

179. *Id.*

180. Leslie H. Fishel, *Wisconsin and Negro Suffrage*, 47 WIS. MAG. OF HIST. 180 (1963) (citations omitted).

181. For background on suffrage for African-Americans in Wisconsin, see *id.* and CURRENT, *supra* note 92, at 148.

182. Fishel, *supra* note 180, at 181-82.

183. Fishel, *supra* note 180, at 182, 184.

184. Fishel, *supra* note 180, at 183.

185. Fishel, *supra* note 180, at 183.

186. Fishel, *supra* note 180, at 183.

to entitle them to a right to vote, in heaven's name, let them have it."[187] Ultimately this convention left it to the state legislature to decide when to put African-American suffrage on the ballot in a general election.[188] The constitution passed and Wisconsin became the thirtieth state in 1848.[189]

The following year's general election had the suffrage question on the ballot.[190] Even though a majority of those voting on this single issue (5,265 to 4,075) voted affirmatively, this was not a majority of the 31,759 votes cast overall, and therefore the resolution failed.[191] The issue arose again in the general election of 1857 and was soundly defeated, 40,915 to 23,074.[192] The Civil War did not make a difference. When the issue was again raised in the 1865 election, the fact that black men had fought in the Civil War and paid taxes did not matter enough; the suffrage issue was defeated by a 9000-vote margin.[193]

One black Wisconsin citizen, Ezekiel Gillespie, had tolerated enough. Represented by Byron Paine, formerly Sherman Booth's attorney and formerly a state supreme court justice, he sued Henry Palmer, the inspector of elections in the Milwaukee ward where he lived.[194] Palmer had refused to allow him to vote in the 1865 election.[195] The case reached the Wisconsin Supreme Court in 1866.[196] Paine argued that the resolution passed by the state constitutional convention in 1848 with regard to a majority of the electorate deciding on African-American suffrage meant a majority of those voting on that particular issue, not a majority voting in the election as a whole.[197] Whether due to Paine's brilliant style, the defendant's lackluster style, the political climate in the state, or all of the above, the supreme court ruled in favor of Ezekiel Gillespie, and African-Americans in Wisconsin finally won the franchise.[198]

By the mid-nineteenth century, Wisconsin was an environ-

187. Fishel, *supra* note 180, at 183 (citation omitted).
188. Fishel, *supra* note 180, at 184.
189. Fishel, *supra* note 180, at 184.
190. Fishel, *supra* note 180, at 184.
191. Fishel, *supra* note 180, at 185.
192. Fishel, *supra* note 180, at 188.
193. Fishel, *supra* note 180, at 193.
194. Fishel, *supra* note 180, at 194-95.
195. Fishel, *supra* note 180, at 194.
196. Gillespie v. Palmer, 20 Wis. 572 (1866).
197. *Id.* at 584; Fishel, *supra* note 180, at 195.
198. 20 Wis. at 572, 590; Fishel, *supra* note 180, at 196.

ment of contrasts—antislavery for the most part but hardly racially unbiased.[199] However, according to the citizens of Wisconsin, one African-American deserved fair treatment; his name was Joshua Glover.

VI. THE WISCONSIN COURT AND ITS OPINIONS

The justices of the Wisconsin Supreme Court were not simply local citizens elevated to the bench and confronted with difficult moral and legal issues. They were, in fact, a worldly group in terms of legal training and experience. Their *Booth* opinions show erudition worthy of some of the better known state jurists of the nineteenth century.

Wisconsin became a state on May 29, 1848.[200] Initially, the state was divided into five circuits, each with its own elected judge.[201] A sixth circuit was added in 1850.[202] These judges sat together annually as a supreme court.[203] The state constitution provided for reorganization of the judiciary after five years if the circuit court/supreme court arrangement proved unsatisfactory.[204] With the growth of the population, this double duty became too burdensome and a separate supreme court was created.[205] The chief justice and two associate justices were elected in September 1852, with staggered terms.[206] Edward Whiton, a circuit court judge since 1848, was elected Chief Justice, and Abram Smith and Samuel Crawford were elected Associate Justices.[207] At the time of the Glover/Booth incidents in 1854, this was still a very new court in a very new state.

None of these three justices was born in Wisconsin.[208] Abram D. Smith studied and practiced law in New York prior to his arri-

199. For a more complete discussion of the antislavery-but-racist mind-set of many people in the free states prior to the Civil War, see ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN (1970). For a discussion of the rise of the antislavery Republican party in Wisconsin, see Theodore C. Smith, *The Free Soil Party in Wisconsin*, PROCEEDINGS OF THE STATE HISTORICAL SOCIETY OF WISCONSIN 97-162 (1894) and CURRENT, *supra* note 92.

200. REED, *supra* note 14, at 29.

201. REED, *supra* note 14, at 29.

202. REED, *supra* note 14, at 30.

203. REED, *supra* note 14, at 29.

204. REED, *supra* note 14, at 30.

205. REED, *supra* note 14, at 32.

206. REED, *supra* note 14, at 30-31.

207. REED, *supra* note 14, at 29-31.

208. For more information on the three justices, see Timothy Higgins, *Justices of the Wisconsin Supreme Court*, 1949 WIS. L. REV. 738 (1949).

val in Wisconsin in 1842, when he set up practice in Milwaukee.[209] Chief Justice Edward V. Whiton was a member of the bar in his native Massachusetts prior to settling in Janesville, Wisconsin, where he set up practice in 1837.[210] He was a member of both houses of the territorial legislature (1838-46), a delegate to the second state constitutional convention (1847-48), a state circuit judge (1848-53) and the first Chief Justice of the reorganized Wisconsin Supreme Court from 1853 until his death in 1859.[211] Samuel Crawford received an excellent education in his native Ireland, then studied law in New York and Illinois before setting up practice in New Diggings, Wisconsin in 1844.[212]

Despite a highly volatile political environment, and a new court, the opinions in the *Booth* cases were remarkably well reasoned and written. Although Justice Smith occasionally bent matters to create a more sympathetic perspective in the reader, he was doing neither more nor less than did Chief Justice Taney. But Taney was not an elected official, and thus did not have to assume responsibility for his opinions in quite the same way as did these state jurists.

The first Wisconsin opinion in the *Booth* line[213] of litigation was Judge Smith's decision regarding Sherman Booth's first petition for a writ of habeas corpus. It asserted a number of principles that would be vehemently argued or pointedly ignored in subsequent opinions. First, he questioned Booth's motives in seeking this writ during the court's vacation instead of during the term that coincided with Booth's arrest.[214] He expressed his own inadequacy to deal with this case, a sentiment common to nineteenth-century jurists deciding issues related to slavery.[215] He also stated: "I do

209. DICTIONARY, *supra* note 87, at 330.

210. DICTIONARY, *supra* note 87, at 374-75.

211. DICTIONARY, *supra* note 87, at 375.

212. WINSLOW, GREAT COURT, *supra* note 23, at 43-44.

213. *In re* Booth, 3 Wis. 13 (1854).

214. *Id.* at 20.

215. *Id.* at 31. This sentiment is reminiscent of Judge Ruffin's remarks in State v. Mann, 13 N.C. (2 Dev.) 263, 264 (1829): "The struggle . . . in the Judge's own breast between the feelings of the man and the duty of the magistrate is a severe one, presenting strong temptation to put aside such questions, if it be possible." Both Smith and Ruffin, however reluctant they may have been, wrote important and controversial opinions on the issue of slavery.

For an interesting discussion of the judges' dilemma in reconciling their moral qualms with the enforcement of the Fugitive Slave Acts, see H.L.A. Hart, *Law in the Perspective of Philosophy: 1776-1976*, 51 N.Y.U. L. REV. 538, 548-51 (1976).

not admit the right . . . merely to experiment upon my opinions . . . ."[216] Despite his misgivings and modesty, however, the justice had something to say and was not to be deterred.

Justice Smith saw no jurisdictional conflict because United States commissioners ("irresponsible and unimpeachable"[217]) did not have "exclusive or ultimate jurisdiction."[218] This was the first step in his attack on the validity of the 1850 Fugitive Slave Law that granted the commissioners jurisdiction in cases such as Glover's.[219]

He then reached the major point over which Wisconsin and the United States Supreme Court would disagree—the question of who had jurisdiction to investigate and decide the kinds of questions presented by the *Booth* cases.[220] He stated:

> Every jot and tittle of power delegated to the federal government will be acquiesced in, but every jot and tittle of power reserved to the states will be rigidly asserted, and as rigidly sustained.
>
> It is only by exacting of the federal government a rigid conformity to the prescribed limitation of its powers, and by the assertion and exercise on the part of the states of all the powers reserved to them, and a due regard by both of their just and legitimate sphere, that obedience can be rightfully exacted of the citizen, to the authority of either.[221]

As a theoretical matter, Chief Justice Taney would probably have agreed with the sentiment expressed here. It would be his assertion five years later that this state supreme court simply exceeded its legitimate authority.[222]

Justices Smith and Taney appeared to agree on two points. First, the Constitution of the United States was the fundamental law of the land and was to be upheld by all citizens.[223] Second, Smith, without elaborating, asserted his agreement with Taney's

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216. *In re Booth*, 3 Wis. at 25.

217. *Id.* at 21.

218. *Id.* at 20.

219. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462, *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200.

220. *In re Booth*, 3 Wis. at 20-22.

221. *Id.* at 22.

222. Ableman v. Booth, 62 U.S. (21 How.) 506 (1859); *see also* Passmore Williamson's Case, 26 Pa. 9 (1855) (holding that state supreme court cannot grant writ of habeas corpus to abolitionist cited and imprisoned for contempt in federal court proceeding regarding freeing of slaves brought into free jurisdiction).

223. *In re Booth*, 3 Wis. at 23.

concurrence in *Prigg v. Pennsylvania*.[224]

There were two major reasons why Justice Smith ordered Booth's release. First, Garland did not make a proper claim on Glover as his fugitive slave, as required under the 1850 Fugitive Slave Act.[225] Unless such a claim was established, the status of the alleged fugitive was identical to any other (white) citizen of Wisconsin.[226] Second, the fugitive slave law was unconstitutional because it violated the Due Process Clause of the Constitution.[227]

He ended the opinion by asserting that there existed no authoritative judicial guide to the 1850 Act.[228] Smith also suggested to the Supreme Court that it review its own decision in *Prigg v. Pennsylvania*.[229]

After Justice Smith ordered Booth discharged, the Supreme Court granted certiorari to correct any error in the prior opinion.[230] In the second part of this opinion, the Wisconsin Supreme Court, by a vote of 2 to 1, upheld the granting of the petition for the writ of habeas corpus.[231] Whiton wrote the majority opinion, Crawford the dissent, and Smith a concurring opinion in which he restated his views even more vehemently.[232]

Chief Justice Whiton's opinion was concise compared with either of Smith's opinions. Whiton addressed several questions deserving comment. First, should the writ have been issued by a state supreme court justice when the prisoner was detained by virtue of legal process conducted by a United States Commissioner?[233] Whiton began his affirmative answer with a definition of comity, but immediately distinguished this case from one in which comity would apply.[234] "We do not see how these commissioners can properly be called officers of the *courts* of the United States . . . . Nor do we think that they can, with any propriety, be called judi-

224. *Id.* at 52 ("Time will not permit a further review of this case."); *see supra* text accompanying notes 143-48 for a discussion of *Prigg v. Pennsylvania*.

225. *In re Booth*, 3 Wis. at 29.

226. *Id.*

227. *Id.* at 47-49.

228. *Id.* at 53.

229. *Id.* at 52.

230. *Id.* at 54.

231. *Id.*

232. *Id.* at 54, 72, 86.

233. *Id.* at 57.

234. *Id.* at 57, 59.

cial officers."[235] To apply comity here would require that the case was pending before a United States district court, a fact that was not shown.[236] The state supreme court appropriately issued the writ.[237]

The second important question Chief Justice Whiton considered was whether the prisoner was discharged in accordance with law.[238] He held that it was lawful after asserting that the warrant was defective because it failed to show why Joshua Glover was in custody.[239] Even if the warrant was not defective, the arrest was still unlawful because the 1850 Fugitive Slave Act under which he was arrested was unconstitutional.[240] The plaintiff in error, Marshal Ableman, had asserted that because the 1793 Act had been held constitutional by the United States Supreme Court in *Prigg*,[241] it followed that the 1850 Act was also constitutional. The court was not persuaded.[242]

After giving the obligatory lament, wishing it did not have to decide these questions, the court held the 1850 Act unconstitutional because 1) it gave commissioners judicial powers[243] and 2) it denied the alleged fugitive due process and a trial by jury.[244]

Chief Justice Whiton denied the validity of comparing the situation of a fugitive from labor with that of a fugitive from justice.[245] With a fugitive from justice, all that was determined by the state official was that he should return to the state from whence he fled for a determination of his guilt.[246] However, for a fugitive from labor, his status was adjudged before extradition.[247] Furthermore, the accused was found to be a slave without a chance to say anything in his own behalf, call witnesses, or in general have an opportunity to be heard.[248]

Justice Crawford, although harboring doubts about the 1850

235. *Id.* at 57.
236. *Id.* at 59.
237. *Id.* at 60-61.
238. *Id.* at 61.
239. *Id.* at 62.
240. *Id.*
241. *Id.* at 62-63.
242. *Id.*
243. *Id.* at 67.
244. *Id.*
245. *Id.* at 83.
246. *Id.*
247. *Id.* at 70-71.
248. *Id.* at 70.

Act, dissented.[249] He stated: "The force of argument . . . has failed to produce that conviction which should justify a court, or judge, to pronounce a legal enactment void, because unconstitutional, and I am therefore unable to concur in the opinion that this law is unconstitutional."[250]

Justice Smith concurred in an incredibly long opinion (48 pages), much of which simply restated his earlier views.[251] Some points, however, deserve attention.

Justice Crawford's dissent evidently stung Smith badly, for he stated that Crawford was equating "a dignified judicial subordination" with "requiring absolute and unqualified submission on the part of the states."[252] Smith was distressed by the underlying notion that because state officials, including the judiciary, cannot be relied on to execute their constitutional duties, federal officers must execute those duties.[253]

Smith asserted that the only issue before the Court in *Prigg v. Pennsylvania* was the constitutionality of the Pennsylvania law.[254] The question was not: Does Congress have exclusive power to legislate in regard to fugitive slaves, *or* do the states have concurrent power to legislate on the same matter?[255] Because these questions were not before the Wisconsin court, the U.S. Supreme Court's observations were merely dicta.[256]

In light of Chief Justice Taney's later opinion, one of Smith's most interesting statements was that an important rule of legal interpretation, found in Story's *Commentaries*, had been violated.[257] This rule dictated that one not "enlarge the construction of a given power beyond the fair scope of its terms" just because it was inconvenient to stay within its bounds.[258] Justice Smith applied the rule to the Booth situation, stating:

> The states have agreed that escaping slaves shall not be discharged from service or labor by the operation of their own

249. *Id.* at 72 (Crawford, J., dissenting).
250. *Id.* at 80.
251. *Id.* at 86-134 (Smith, J., concurring).
252. *Id.* at 98.
253. *Id.*
254. *Id.* at 108.
255. *Id.*
256. *Id.* at 109.
257. *Id.* at 110.
258. *Id.* (referring to JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES I 409-10 (1833)).

> laws, but that when claimed within their territory, and the claim established, shall be delivered up. This is the extent of the obligation. Is it not to enlarge the scope of its terms, to hold . . . that they have thrown open their territories to incursion by fugitive hunters, and relinquished all power to protect their own people from false charges of escape, or of the obligation of service? or from assault and outrage during the search?[259]

Smith dwelled at length on the fact that the slave, while chattel in a slaveholding state, is a "MAN . . . . a PERSON" in Wisconsin.[260]

Smith maintained that *Prigg* overturned the long-established principle that all powers not delegated to the federal government are reserved to the states.[261] Smith interpreted *Prigg* as holding that powers not specifically reserved for the states belong to the federal government and that these federal powers can be expanded at will.[262] "Fealty to the doctrines of this case is treason to the law of all preceding cases."[263] Given the perceived proslavery stance of the federal government, as exemplified by the *Prigg* decision, Smith was compelled to comment bitterly: "The rights, interests, feelings, . . . of the free states are as nothing, while the mere pecuniary interests of the slaveholder are everything."[264]

He concluded his concurrence with a long critique of *Prigg v. Pennsylvania.*[265] The Supreme Court did not deal with the fact that Margaret Morgan's children were taken with their mother into Maryland.[266] One of the children had been born in Pennsylvania more than a year after the mother's escape from Maryland.[267]

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259. *In re Booth*, 3 Wis. at 110-11 (Smith, J., concurring).

260. *Id.* at 113.

261. *Id.* at 115-17.

262. *Id.*

263. *Id.* at 117.

264. *Id.* at 123. Such extreme language, representing an extreme view of the impasse over slavery rapidly approaching in the United States, has been expanded elsewhere. One commentator has noted: "By the eve of secession, on the important issues of slavery, comity, and federalism, the most extreme courts in the North and those in the South acted as though they were in separate nations—and they soon would be." PAUL FINKELMAN, AN IMPERFECT UNION 286 (1981). The clerk of the Supreme Court of the United States, William Thomas Carroll, has reported that on delivery of a copy of the Court's opinion in *Ableman v. Booth* to President Buchanan, the President remarked that "[T]he Supreme Court and the Executive should stand shoulder to shoulder in such a crisis, that united they might be able to resist the fanaticism of both the North and the South . . . ." Memorandum of William Thomas Carroll, dated Apr. 28, 30, 1859, *cited in* A.J. Beitzinger, *Chief Justice Taney and the Publication of Court Opinions*, 7 CATH. U. L. REV. 32, 34 (1958).

265. *In re Booth*, 3 Wis. at 123 (Smith, J., concurring).

266. *Id.* at 129.

267. *Id.*

Smith's analysis of *Prigg* was that either the condition of the slave mother attached to the child regardless of the child's place of birth, or that the Court simply overlooked this "little humanity."[268]

Finally, in case his position had been misunderstood, Justice Smith stated:

> [The states] will never consent that a slave owner, his agent, or an officer of the United States, armed with process to arrest a fugitive from service is clothed with entire immunity from state authority; to commit whatever crime or outrage against the laws of the state, that their own high prerogative of *habeas corpus* shall be annulled, their authority defied, their officers resisted, the process of their own courts condemned, their territory invaded by federal force, the houses of their citizens searched, the sanctuary of their homes invaded, their streets and public places made the scene of tumultuous and armed violence, and state sovereignty succumb, paralyzed and aghast, before the process of an officer unknown to the constitution, and irresponsible to its sanctions. At least, such shall not become the degradation of Wisconsin, without meeting as stern remonstrance and resistance as I may be able to interpose, so long as her people impose upon me the duty of guarding their rights and liberties, and of maintaining the dignity and sovereignty of their state.[269]

After the Wisconsin Supreme Court opinion, the federal grand jury indicted Booth and Rycraft for aiding and abetting Glover's escape.[270] One question to consider is why they were indicted in the first place, given the strong public sentiment against the 1850 Fugitive Slave Act and the public arousal over Joshua Glover's capture. A possible answer is found in Parker Reed's 1882 edition of the *Bench and Bar of Wisconsin*:

> The motion of [Booth's] counsel that the indictment should be set aside, on the ground, as shown by the affidavits of four witnesses, that two of the grand jury which had indicted him were strongly prejudiced against the defendant, and had expressed themselves in favor of his conviction, was overruled.[271]

With the indictment pending against him, Sherman Booth once again petitioned the Wisconsin Supreme Court for a writ of habeas corpus.[272] This time the writ was denied in an opinion writ-

268. *Id.* at 130.
269. *Id.* at 133-34 (Smith, J., concurring).
270. *Ex parte* Booth, 3 Wis. 134, 135-36 (1854).
271. REED, *supra* note 14, at 501.
272. *Ex parte Booth*, 3 Wis. at 135.

ten by Chief Justice Whiton with a concurrence by Justice Smith.[273] The rationale of the court in taking this politically unpopular step was that once the district court obtained jurisdiction, its jurisdiction was exclusive and the Wisconsin court could not interfere.[274] In response to Booth's assertion that no court can have jurisdiction to try a person for an alleged violation of a void statute, Whiton said that the district court must determine all questions presented by the case, including the question of its own jurisdiction.[275]

Justice Smith felt compelled to distinguish this habeas corpus petition from the first one Booth requested.[276] The granting of the first petition was no bar to new proceedings in the federal court: "His discharge is by no means an acquittal."[277] If state and federal courts wrested cases from each other for fear that the other tribunal would not properly decide matters, this would show an unseemly want of confidence among judicial brethren.[278] Smith declared that the Wisconsin Supreme Court's decision on the unconstitutionality of the 1850 Fugitive Slave Act was not binding on the federal court.[279] But he also suggested that Booth could use the state pronouncement as part of his defense in federal court.[280]

Booth paid bail and was released from jail after ten days.[281] Booth and Rycraft were to be tried together in federal district court in November 1854, but a case of typhoid fever prevented Booth's appearance and Rycraft was tried separately.[282]

To understand the federal position on these matters, it is helpful to look at Judge Miller's charge to the jury in Rycraft's case.[283] "This being a national court, you are a national jury, equally removed, with the judge, from all local influences."[284] As a state-

273. *Id.* at 136, 138.
274. *Id.* at 137.
275. *Id.* at 137-38.
276. *Id.* at 138.
277. *Id.* at 140.
278. *Id.* at 141.
279. *Id.* at 143.
280. *Id.* at 144. One commentator has speculated about this denial of the writ of habeas corpus: "One cannot help suspecting that the members of the court indulged the hope that no Wisconsin jury could be found, which would convict Booth, and that the whole affair would soon be moot, by reason of his triumphant acquittal." Hagan, *supra* note 36, at 22.
281. REED, *supra* note 14, at 501.
282. REED, *supra* note 14, at 501.
283. United States v. Rycraft, 27 F. Cas. 918 (D.C.C. Wis. 1854).
284. *Id.* at 919.

ment of a goal to which the jurors should strive, Judge Miller's point was plausible. But as a statement of reality, this was simply untrue. Given the law enforcement difficulties Judge Miller had already faced, he, most of all, was aware of the heavy weight of local political influences.

The following excerpt is even more problematical:

> This is a prosecution for the public offence of resisting a lawful process . . . . The judge has lawful authority to issue this process . . . . It was lawfully served by the deputy marshal; Glover was thereby in the custody of the law, from which he escaped before he was delivered.[285]

It is uncertain what the term "lawful" meant to Judge Miller. When slaveowner Garland had requested a writ of habeas corpus after his arrest for assault and battery on Glover, Miller granted the petition on the reported rationale that Garland "could not be interfered with by any legal process by the state, and that in the execution of his slave warrant he was justified in using any violence, even to the taking of life, if necessary, to secure his slave, and that no state process could interrupt such violence."[286] Though slave jurisdictions considered physical violence against slaves an acceptable form of "correction,"[287] Wisconsin was a free state and not accustomed to this type of behavior against one of its quiet, peaceful residents. Furthermore, the 1850 Fugitive Slave Act nowhere states or implies that this kind of violence was lawful in taking an alleged fugitive slave. Indeed, if it were permissible under the law, why would there be such elaborate provision on the issuance of the certificate to the slaveowner/claimant? It is doubtful that Justice Smith would have agreed with Judge Miller's concept of "lawful process."

A third troublesome point made by Judge Miller in this jury charge was: "If, as from the defendant's evidence, he was associated with that committee which was engaged in impeding or obstructing the process, he must take the consequences. They are all indictable."[288]

The fact is that very few were indicted and only Rycraft and

285. *Id.* at 922.

286. REED, *supra* note 14, at 500.

287. State v. Mann, 13 N.C. (2 Dev.) 263, 266 (1829) ("The power of the master must be absolute to render the submission of the slave perfect.").

288. *Rycraft*, 27 F. Cas. at 923.

Booth were actually convicted and punished.[289] Booth was ultimately pardoned by the President.[290] The question this raises is the ultimate nightmare of the lawmaker: How does the system deal with massive civil disobedience of an unpopular and arguably immoral and unconstitutional law? This is certainly not the only case in the decade preceding the Civil War in which groups of citizens undertook to emasculate this "intrinsically distasteful law."[291]

When Booth recovered from his illness, his case came to trial in January 1855.[292] The trial lasted five days and the jury deliberated its verdict for seven hours.[293] They found Booth not guilty on the first three counts for resisting United States process and guilty on the two counts regarding aiding Joshua Glover's escape.[294] Three jurors adopted a resolution that made it clear that while they saw conviction of Booth as inevitable, they were not morally comfortable with their role in the enforcement of the Fugitive Slave Law.[295] They ended their resolution by requesting the court's

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289. "From the legal point of view the men who helped Glover to escape were undoubtedly guilty . . . . But their case was really that of the people of Wisconsin, and a people can neither be indicted nor put on formal trial." JOHN N. DAVIDSON, NEGRO SLAVERY IN WISCONSIN AND THE UNDERGROUND RAILROAD 238 (1896). "Because he was the most conspicuous member of the movement to free Glover, Booth was arrested . . . ." MORRIS, *supra* note 121, at 174.

It is not as though the other participants were not known.

> A much more appropriate subject for the slaveholder's wrath would have been Edward P. Allis, the founder of the great iron works in Milwaukee, and a candidate for Governor of Wisconsin on the radical greenback ticket in 1877. Mr. Allis had hold of the piece of square timber which was used as a battering-ram when the door of the jail was smashed in and the slave taken out . . . . Booth made a propitiation for the sins of all the Abolitionists in Wisconsin . . . .

THOMSON, *supra* note 115, at 96-97.

290. *See supra* notes 115-16.

291. For a discussion of *Bushnell,* see 1 BERRYMAN, *supra* note 47, at 28. *See Ex Parte* Bushnell, 9 Ohio St. 77 (1859); Carter, *supra* note 97, at 163; COVER, *supra* note 117, at 188-89, 223, 253-54. The case of the fugitive slave Anthony Burns has been described in a number of publications, including David R. Maginnes, *The Case of the Court House Rioters in the Case of the Fugitive Slave Anthony Burns, 1854*, 56 J. OF NEGRO HIST. 31 (1971), and JANE PEASE & WILLIAM PEASE, THE FUGITIVE SLAVE LAW AND ANTHONY BURNS (1975).

For a theoretical discussion of nullification as "a socially useful part of the total legal process, . . . or as mere law-breaking . . . ," see Robert C. Binkley, *Nullification and the Legal Process*, 14 MASS. L.Q. 109 (1928-29).

292. REED, *supra* note 14, at 501.

293. REED, *supra* note 14, at 501.

294. REED, *supra* note 14, at 501-02.

295. REED, *supra* note 14, at 501-02.

clemency.[296]

Both Booth and Rycraft were sentenced to brief stays in the county jail and fines of $1,000 and $200, respectively.[297] On January 26, 1855, both men petitioned the Wisconsin Supreme Court for writs of habeas corpus.[298] These were granted, with all three justices filing opinions justifying this inconsistent and dangerous course of action because of its blatant challenge to federal authority.[299]

Chief Justice Whiton's brief opinion simply stated that the state supreme court should have the power to release its citizens from illegal imprisonment.[300] The federal court should have realized it had no jurisdiction because the federal law in question was a nullity.[301]

Justice Crawford, while somewhat cautious in his earlier opinion regarding Booth's first petition for a habeas writ,[302] now maintained that the district court did not have jurisdiction in this case because the indictment did not describe Glover as a fugitive from labor.[303] He ignored the fact that the warrant for Glover's arrest, which described him as a fugitive from labor, was reproduced in the indictment.[304] More incredible still, in light of the Wisconsin court's previous assertions, was the following:

> If either [state or federal courts], indeed, should assume to act in derogation of the prerogative of the other, a means of correcting

296. REED, *supra* note 14, at 502. At least three petit jurors felt empathy as indicated by the following resolution, which they adopted after Booth's indictment:

> That while we feel ourselves bound by a solemn oath to perform a most painful duty, in declaring the defendant guilty of the above charge, and thus making him liable to the penalties of a cruel and odious law, yet at the same time, in so doing, we declare that he performed a noble, benevolent and humane act, and we thus record our condemnation of the fugitive slave law, and earnestly commend him to the clemency of the court.

REED, *supra* note 14, at 502. Another commentator also describes them as "an unwilling jury." HOWE, *supra* note 19, at 232.

297. Beitzinger, *supra* note 8, at 15.

298. *In re* Booth, 3 Wis. 144, 146 (1854).

299. *Id.* at 171-72.

300. *Id.* at 160-61.

301. *Id.* at 160.

302. Justice Crawford's earlier opinion is at *In re Booth*, 3 Wis. at 72 (Crawford, J., dissenting).

303. *In re Booth*, 3 Wis. at 167-68.

304. *Id.* at 148-50. This text includes the warrant for Glover's arrest. *Id.* at 149 ("Whereas Bennami S. Garland hath made affidavit . . . that one Joshua Glover, a negro man, owes him labor and service, according to the laws of Missouri . . . .").

> the evil would be very necessary, but we are not without that corrective. An unwarrantable infraction of the jurisdiction of the state tribunals by the federal courts, would call forth an assertion of their prerogatives and power by the state courts, and if in this the latter were wrong, a peaceful means of redress is afforded by a resort to the court of *dernier resort,* the supreme court of the United States, whose decision should and would be acquiesced in by all parties.[305]

The major principle asserted by Justice Smith was that the state supreme court had the power to inquire into the legality of inferior federal court proceedings that led to the imprisonment of a citizen of the state, and "the power to inquire includes the power to decide."[306] To the query of whether such interference might cause confusion in the interpretation of the Constitution, his response was to analogize that situation to the checks and balances system of the federal government, where a federal court can convict a person only to have that person pardoned later by the federal executive.[307] If interference does not cause havoc in the latter situation, why should it in the former?[308] Smith then speculated that it is safer to resist unconstitutional power at its onset "than to wait until the evil is so deeply and firmly rooted that the only remedy is revolution."[309] This prediction of war would be echoed in Taney's opinion.[310]

What started with Justice Smith granting the first habeas corpus writ to Booth hardened over eight months into a vehement antislavery, antifederalist stance. Could these justices have backed down at this point? Justice Crawford was defeated in his 1855 bid for reelection mainly because he was not willing to take a strong antislavery stance in the *Booth* case.[311] If Smith and Whiton had not already been prone to strong antislavery sentiments, a desire to maintain a long tenure on the bench might have pushed them in that direction.

Judge Andrew Miller, appointed for life, did not operate under

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305. *Id.* at 171.
306. *Id.* at 175.
307. *Id.* at 181.
308. *Id.*
309. *Id.* at 182.
310. *Ableman*, 62 U.S. at 520-21.
311. *See* DICTIONARY, *supra* note 87, at 89; WINSLOW, GREAT COURT, *supra* note 23, at 87. For a thoughtful discussion on the judges-as-politicians idea, see Joseph Schafer, *Stormy Days in Court—the* Booth *Case*, 20 WIS. MAG. OF HIST. 89, 108-10 (1936).

these constraints.[312] Andrew G. Miller was a native of Pennsylvania, where he practiced law from 1822 to 1838 and held office as state attorney general for part of that time.[313] In 1838, President Van Buren commissioned him an associate justice of the Wisconsin territorial supreme court.[314] He served in that capacity until 1848, when he was appointed judge of the federal district of Wisconsin.[315] He maintained that appointment until the district was split in 1870; he then continued as judge for the eastern district until 1873.[316]

While one commentator has described Miller's demeanor throughout the *Booth* litigation as firm and courageous, he also noted that Miller's decisions were "virtually the end of the law for litigants"[317] because the expense of an appeal was prohibitive for many citizens. Given such power vested in one man, it must have been particularly difficult for him to accept the recalcitrance of his judicial cousins on the state supreme court. Chief Justice Ryan would say of him posthumously: "[T]here was something grand in the lonely self-reliance and steadfastness of the man . . . ."[318]

VII. CHIEF JUSTICE TANEY'S OPINION

By 1859, the tug of war between the state and federal judiciary over the *Booth* cases was firmly established. It was time for a higher judicial statement. Chief Justice Taney authored the Court's opinion.[319]

The opinion is only twenty-one pages in length, a middling size Taney opinion.[320] The first eight pages are a recounting of the history of the case.[321] In the remaining thirteen pages, Justice Taney made assertions that do not survive scrutiny and offers few legal or historical references to support his analysis.

The first shortcoming is his statement that the supremacy of the state courts over the federal courts in cases arising under the

312. 2 BERRYMAN, *supra* note 123, at 2 ("The large and nearly absolute power vested in the district judge could not fail to excite the jealousy of lawyers and their clients . . . .").

313. 2 BERRYMAN, *supra* note 123, at 4.

314. 2 BERRYMAN, *supra* note 123, at 4.

315. 2 BERRYMAN, *supra* note 123, at 4.

316. 2 BERRYMAN, *supra* note 123, at 4-5.

317. 2 BERRYMAN, *supra* note 123, at 1.

318. 2 BERRYMAN, *supra* note 123, at 7.

319. Ableman v. Booth, 62 U.S. (21 How.) 506, 507 (1859).

320. His majority opinion in *Dred Scott* was 56 pages long; in *Prigg v. Pennsylvania*, Justice Taney's dissent was 8 pages long.

321. *Ableman*, 62 U.S. at 507-14.

Constitution and federal laws had been asserted in *Booth* by a state supreme court for the first time.[322] This ignores the numerous habeas corpus cases in the early nineteenth century regarding minors in the armed forces.[323] The practice was long established that a state court could issue the writ for a person held in the custody of a federal officer.[324] Taney's opinion in *Ableman v. Booth* was the first Supreme Court challenge to such state action.

The second difficulty with Taney's opinion lies in his assertion that if Wisconsin could disregard the 1850 Fugitive Slave Law, then it could disregard any federal law.[325] If Wisconsin could do this, so could other states. Therefore, "it is very certain that the State courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offense, and justly punished, in one State, would be regarded as innocent, and indeed as praiseworthy, in another."[326] The majority decision in the subsequent 1870 Wisconsin Supreme Court case of *In re Tarble*[327] was written by Justice Byron Paine, Booth's attorney throughout the 1850's litigation. Justice Paine took this occasion to engage in a lengthy defense of the Wisconsin *Booth* opinions.[328] According to Paine, the Wisconsin court never claimed authority to annul a federal court judgment, but was simply acting under the familiar principle that

> whenever, in any court, in a case in which it has jurisdiction, the validity of the judgment of any other court is drawn collaterally in question, it must decide whether the court rendering it had

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322. *Id.*

323. Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 274-75 (1965).

324. *Id.*

325. 62 U.S. at 514-15.

326. *Id.* at 515.

327. *In re* Tarble, 25 Wis. 390 (1870), *rev'd*, 80 U.S. (13 Wall.) 397, 412 (1871); *see also* HURD, *supra* note 120, Book II, ch. 1, § 5; *Concurrent Jurisdiction of the Federal and State Courts*; *see also Collier's Case—Jurisdiction of Federal and State Courts*, 6 OP. ATT'Y GEN. 103 (1853); WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 153-55 (1980); WILLIAM NELSON, ROOTS OF AMERICAN BUREAUCRACY, 1830-1900, at 73, 76 (1982).

> It seems highly relevant to note that the broad assertion of federal power and state helplessness concerning habeas corpus jurisdiction in *Ableman v. Booth* (1859) had to be reasserted after the Civil War in *Tarble's Case* . . . (1872). It is as if the unambiguous language of *Booth* could not be trusted because of its intimate connection with slavery and with the court that had rendered *Dred Scott*.

COVER, *supra* note 117, at 187 n. (1975).

328. *In re Tarble*, 25 Wis. at 390-412.

> jurisdiction. This familiar doctrine has never been more strongly asserted or acted on than by the Supreme Court of the United States.[329]

Paine may have been overly defensive and simplistic in his explanation of the Wisconsin court's actions; Taney, to prove a point, may have been painting too harsh a picture of the Wisconsin court's attitude. Taney's reasoning, however, ignored the uniquely volatile nature of slavery and the futility of regulating, by man-made law, an institution that many Americans viewed as violative of a higher law. It did not necessarily follow that offenses in one state would be praiseworthy in another, but the greatest potential for this existed with regard to slavery.

Taney next asserted that the Wisconsin Supreme Court justices did not state from whence they derived the power to review a federal court decision.[330] He chose to ignore their opinions because Justice Smith explicitly stated that they were following the rule that powers not specifically reserved for the federal government by the Constitution remain within the states' realm.[331]

Taney repeatedly referred to violence, force of arms, revolution, and similar phrases to suggest the dire consequences of not submitting to the authority of the federal government and its tribunals.[332] However, he later recommended that a federal officer in a similar situation in the future should use force to resist state attempts to interfere with his prisoner.[333] If one expected a temperate judicial statement from the Supreme Court in the volatile year of 1859, there was no evidence of it in the opinion. Taney ended the opinion by flatly stating that the fugitive slave law was constitutional.[334]

Some commentators consider Taney's opinion in *Ableman v. Booth* praiseworthy.[335] In contrasting the unanimity of the Court

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329. *Id.* at 396.

330. *Ableman*, 62 U.S. at 514.

331. *In re Booth*, 3 Wis. at 115-17. For more discussion of Taney's ignoring the Tenth Amendment's reservation of nondelegated powers to the states, see DUKER, *supra* note 327, at 152-53.

332. *Ableman*, 62 U.S. at 517, 519-21.

333. *Id.* at 524.

334. *Id.* at 526.

335. *See* Winslow, *Special Address*, *supra* note 23, at 56, where this extremely pro-Wisconsin author states: "The issue was of supreme importance, and the opinion was one worthy of the issue and of the distinguished jurist who wrote it." Hagan states: "In force, loftiness of tone and lucid logic, it is not surpassed by any judicial pronouncement in our

in *Booth* and its diversity of opinions in *Dred Scott*, one commentator noted:

> The Booth opinion marked the Chief Justice at his best, without any of the striving after extreme effect or the rewriting of American history for the making of a constitutional point which had characterized his derided treatment of Dred Scott. It was thoughtful, measured, and disciplined to the last degree.[336]

Although *Booth* was not the extreme opinion *Dred Scott* was, it nonetheless sprang from the same mind that refused to understand how intolerable slavery had become to a large part of the American population. Rather than attempt to conciliate that part of the population, Taney chose to threaten them with force if they did not subordinate themselves to superior federal law. In modern parlance, "he just didn't get it."

With the reversal of the Wisconsin Supreme Court decisions by the United States Supreme Court, the final scene in the drama shifted back to Wisconsin. The people in the state were so outraged that the legislature was prompted to enact joint resolutions on March 19, 1859 voiding this assumption of jurisdiction by the federal judiciary, accusing the federal government of despotism, and calling for a "positive defiance" as the "rightful remedy."[337]

VIII. WISCONSIN'S FINAL OPINION

When the Supreme Court of Wisconsin considered the cases on remand,[338] the composition of the court had changed since its prior consideration of the *Booth* litigation.[339] Byron Paine, formerly counsel to Sherman Booth, had been elected to the court but abstained from participating in the decision.[340] Chief Justice Luther Dixon held that the Supreme Court of the United States did have appellate jurisdiction over the highest state courts.[341] Justice

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annals and, in fact, is equalled only by Marshall's mighty opinion in *McCulloch v. Maryland*." Hagan, *supra* note 36, at 23.

336. CARL B. SWISHER, THE TANEY PERIOD 1836-64, at 662 (1974).

337. *See supra* note 86; *see also* Mason, *supra* note 20, at 143 ("These resolutions, and the personal liberty law of 1857 [1857 Wis. Laws 12], were Wisconsin's strongest formal protests against the fugitive slave law."). For a history of the passage of the Wisconsin Personal Liberty Law, and the accompanying resolutions, see MORRIS, *supra* note 121, at 176-80.

338. Ableman v. Booth, 11 Wis. 517 (1859).

339. Beitzinger, *supra* note 8, at 21-22.

340. *Ableman*, 11 Wis. at 518.

341. *Id.* at 540.

Cole disagreed, but declined to file an opinion.[342] Given Paine's views as expressed in *Tarble*[343] eleven years later, it seems fair to state that the Wisconsin Supreme Court, while officially agreeing with the federal high court and thus bringing this litigation to an end, in fact still disagreed with the Supreme Court of the United States in a 2-to-1 decision.

Justice Dixon made it clear that this opinion was entirely the result of his own research and thought, even lamenting the "want of those arguments of . . . counsel by which courts are usually so much enlightened . . . ."[344] He was embarrassed by this and by the court's decision five years earlier to refuse to make a return to the United States Supreme Court's writ of error.[345] He reiterated that he had given this matter great study and thought ("my sole purpose has been to be right . . . ."[346]) and then proceeded to explain that this was not the federal usurpation of state powers.

Dixon noted that the 25th section of the Judiciary Act stated that the Supreme Court did have appellate power over the state court because a Constitutional question was involved.[347] He then cited Article III, section 2 of the Constitution, the pertinent and controversial sentence being: "The judicial power shall extend to all cases in law and equity arising under this constitution . . . ."[348] He next cited Supreme Court cases[349] dispositive of the question whether "*all* cases in law and equity" meant inferior federal court cases only or cases in both federal and state courts.[350] The latter was the proper construction.[351] This proposition was further bolstered by a quotation from Kent's *Commentaries* stating that federal disposition of such cases would prevent state prejudices and jealousies from obstructing justice and would "preserve uniformity of decision throughout the United States."[352]

In response to the opposing viewpoint that "cases" meant any

342. *Id.* at 518.
343. *In re* Tarble, 25 Wis. 390 (1870).
344. *Ableman*, 11 Wis. at 521.
345. *Id.*
346. *Id.* at 522.
347. *Id.* at 524-25.
348. *Id.* at 525 (citing U.S. CONST. art. 3, § 2).
349. *Id.* at 527 (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Cohens v. Virginia, 19 U.S. (6 Wheat.) 624 (1821)).
350. *Id.* at 527.
351. *Id.*
352. *Id.* at 534.

suits commenced in an inferior federal court possessing original jurisdiction, Justice Dixon stated:

> The radical defect of this doctrine is that, by giving this narrowed meaning in the word "*cases,*" it almost entirely cuts off, . . . the power of the federal courts with which the advocates of this doctrine themselves admit it was the intention of the framers to invest them by the clause in question, and vests it *exclusively* in the state courts.[353]

Dixon concluded by admitting he had written a longer opinion than he had intended ("The subject is one of much interest, and it is difficult to know where to stop."[354]). However, he could not resist appending a pamphlet authored by an unnamed but "eminent" member of the Milwaukee bar who supported his view of the case.[355]

Jurisdiction was about to be taken away from both federal and state courts and lodged on the battlefield. Those efforts to be right, no matter how vigorously executed or how sincerely meant, became trivial in light of the events to come.

IX. CONCLUSION

At its simplest, the *Booth* story is about a fugitive slave, Joshua Glover, who got away. The fact that it was far more complicated than that has to do with the timing—i.e., 1854-1860, the era of *Dred Scott* and the hardening of attitudes on both sides of the Mason-Dixon line. It has to do with geography—i.e., the fact that this took place in the relatively new state of Wisconsin, a state with a distinctly antislavery bias. And it has to do with the subject matter—i.e., slavery, the legally condoned ownership of one human being by another human being.

The *Booth* cases deserve a more prominent place in America's historical consciousness of the nineteenth century than they currently hold. A part of this country eventually seceded because of the antislavery cast of the federal government, particularly after the election of President Lincoln in 1860. But what has been forgotten is that there was an equally vehement segment of the population so offended by the perceived proslavery bias of both the federal gov-

353. *Id.* at 535-36.
354. *Id.* at 540.
355. *Id.* at 540-55.

ernment and the Supreme Court that it too was ready to secede, and nearly did so.

Though one cannot prove in an empirical sense just why the *Booth* cases remained so obscure, one can certainly speculate. Several theories might be advanced to explain their relative obscurity. First, the major part of the controversy took place on the western frontier and the state supreme court decisions were authored by justices who, while competent, do not rank among the better-known state jurists of the nineteenth century.

Second, much of the action was overshadowed by *Dred Scott.* Perhaps Taney wrote a shorter, less strident opinion in *Booth* because he could not face another national outcry such as the one that had accompanied *Dred Scott.* Furthermore, in *Booth*, the slave Glover had long since made his way to freedom and anonymity. The same could not be said of Dred Scott. Third, the Civil War was so near at the time the *Booth* cases came to a close that the public consciousness could no longer be shocked.

Finally, history is always written by the victors. Inevitably, all the morally correct perspectives are aligned on the victor's side and all the morally incorrect views on the side of the defeated. Preserving the Union and abolishing slavery were among the chief motivations for the Northern pursuit of war. Asserting the right of states to secede and preserving slavery were Southern motives. Because the *Booth* story does not fit neatly in this schema, it has been forgotten.

It is time to reassess the importance of the *Booth* cases. There was always a tension between slave and free jurisdictions regarding the appropriate way, legally, socially, and morally, to treat slaves. In 1859, the Mississippi Supreme Court criticized Ohio for granting citizenship to African-Americans:

> Suppose that Ohio, still further afflicted with her peculiar philanthropy, should determine to descend another grade in the scale of *her peculiar* humanity, and claim to confer citizenship on the chimpanzee or the ourang-outang [sic] (the most respectable of the monkey tribe), are we to be told that "comity" will require of the States not thus demented, to forget their own policy and self-respect, and lower their own citizens and institutions in the scale of being, to meet the necessities of the mongrel race thus attempted to be introduced into the family of sisters in this confederacy? The doctrine of comity is not thus un-

reasonable.[356]

This extreme Southern judicial view was difficult enough for the citizens of Northern states to accept. But when the U.S. Supreme Court entered the picture on the side of slaveholding interests, a violent end became inevitable.

In 1842, *Prigg* affirmed the constitutionality of the Fugitive Slave Law of 1793. In 1857, *Dred Scott* denied citizenship and personhood to slaves. In 1859, *Booth*, in its announcement of the constitutionality of the 1850 Fugitive Slave Law, made clear that open resistance and civil disobedience on a massive scale was to be the ultimate conclusion to the struggle. The Wisconsin judiciary backed down and wrote a final conciliatory opinion acknowledging the supremacy of the federal government in that case. But what if a Southern sympathizer had been elected President in 1860? What if another Joshua Glover had been taken from Wisconsin by his former slave master? How long would the Wisconsin populace have complied with this state of affairs? The *Booth* story suggests both that the tensions were too great by 1860 to avoid war and that the importance of who fired the first shot is negligible. *Booth*, with *Prigg* and *Dred Scott*, is also an indicator of what happens when a government strays too far from the moral principles of a large segment of the populace. In that, there is a lesson for all time.

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356. Mitchell v. Wells, 37 Miss. 235, 264 (1859) (emphasis added). In his dissenting opinion, Justice Handy succinctly stated the southern secessionist view:

> Whilst the confederacy [Union] continues, we cannot justify ourselves as a State in violating its spirit and principles, because other States have, in some respects, been false to their duties and obligations. It may justify us in dissolving the compact, but not in violating our obligations under it whilst it continues.

Id. at 286 (Handy, J., dissenting).